

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
**HASELEY TRUCKING CO., INC.** :  
for Revision of a Determination or for Refund of :  
of Sales and Use Taxes under Articles 28 and 29 :  
of the Tax Law for the Period March 1, 1999 through :  
February 28, 2002. :

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In the Matter of the Petition :  
of :  
**MARK M. HASELEY** :  
for Revision of Determinations or for Refund of :  
Sales and Use Taxes under Articles 28 and 29 :  
of the Tax Law for the Periods March 1, 1999 :  
through February 28, 2002 and June 1, 2001 :  
through November 30, 2001. :

DETERMINATION  
DTA NOS. 819672, 819673,  
819674 AND 819675

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In the Matter of the Petition :  
of :  
**MARK M. HASELEY** :  
for Redetermination of Deficiencies or for Refund :  
of Personal Income Tax under Article 22 of the :  
Tax Law for the Period January 1, 2001 through :  
March 31, 2002. :

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Petitioner Haseley Trucking Company, c/o Mark M. Haseley, 10315 Lockport Road,  
Niagara Falls, New York 14304-1151, filed a petition for revision of a determination or for

refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1999 through February 28, 2002.

Petitioner Mark M. Haseley, 10315 Lockport Road, Niagara Falls, New York 14303-1151, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods March 1, 1999 through February 28, 2002 and June 1, 2001 through November 30, 2001, and for redetermination of deficiencies or for refund of personal income tax under Article 22 of the Tax Law for the period January 1, 2001 through March 31, 2002.

On June 9, 2004, petitioners, appearing by Dopkins and Company, LLC (Joseph B. Fornasiero, C.P.A.), and the Division of Taxation, by Christopher C. O'Brien, Esq. (Susan Hutchison, Esq., of counsel), waived a hearing and agreed to submit the matters for determination based upon documents and briefs to be submitted by November 12, 2004, which date commenced the six-month period for issuance of this determination (Tax Law § 2010[3]). After due consideration of the documents and arguments submitted, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

### ***ISSUES***

I. Whether the sales and use tax audit method employed by the Division of Taxation was reasonable and, if so, whether petitioners have shown any errors in either the application of such method or the results derived therefrom.

II. Whether the Division of Taxation should have collected any amounts of tax as assessed against petitioners from either the New York State Department of Transportation or from the corporate petitioner's bonding company rather than from the petitioners.

***FINDINGS OF FACT***

1. Petitioner Haseley Trucking Co., Inc. (“Haseley Trucking”) was established in 1956 as a small trucking and excavation company. Upon the death of the company’s founder, petitioner Mark M. Haseley assumed the office of president of Haseley Trucking and increased the size and scope of the company’s site work, trucking and landfill related projects. Haseley Trucking also grew to include a number of other companies, including Haseley Construction Company and M & M Rental & Leasing Corporation (“the Haseley Companies”).

2. On July 22, 2002, the Division of Taxation (“Division”) issued the following Notice of Determination to petitioner Haseley Trucking:

Notice Number	Tax Type	Period	Amount <sup>1</sup>	DTA Number
L-02130430	Sales/Use	03/01/99 - 02/28/02	\$20,019.01	819672

3. On the dates specified below, the Division issued the following notices of determination and notices of deficiency to petitioner Mark M. Haseley, upon the assertion that he was a person responsible to collect and remit sales and use taxes and withholding taxes on behalf of Haseley Trucking and two other Haseley companies (Haseley Construction Company, Inc., and M & M Rental & Leasing Corporation):

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<sup>1</sup> The amount shown reflects tax only, and does not reflect penalty and interest amounts assessed.

Date	Notice No.	Tax Type	Period	Amount <sup>2/3</sup>	DTA No.
04/07/03	L-022159918	Sales/Use	03/01/99 - 02/28/02	\$20,019.01	819673
09/03/02	L-021392998	Withholding	Per. Ended 03/31/02	\$2,356.23	819674
08/19/02	L-021394999	Withholding	Per. Ended 12/31/01	\$8,400.00	819674
08/19/02	L-021395000	Withholding	Per. Ended 09/30/01	\$43,236.65	819674
08/19/02	L-021395001	Withholding	Per. Ended 06/30/02	\$38,257.20	819674
08/19/02	L-021395002	Withholding	Per. Ended 03/31/01	\$30,224.35	819674
08/19/02	L-021406262	Withholding	Per. Ended 03/31/02	\$5,857.96	819674
08/19/02	L-021406263	Withholding	Per. Ended 12/31/01	\$13,960.47	819674
08/19/02	L-021406264	Withholding	Per. Ended 09/30/01	\$23,622.58	819674
08/19/02	L-021406265	Withholding	Per. Ended 06/30/01	\$22,788.27	819674
08/19/02	L-021406266	Withholding	Per. Ended 03/31/01	\$18,421.97	819674
10/21/02	L-021684276	Sales/Use	Per. Ended 11/30/01	\$10,950.87	819675
10/21/02	L-021684277	Sales/Use	Per. Ended 08/31/01	\$19,331.87	819675

4. The foregoing notices were issued as the result of a field audit of Haseley Trucking's business. On January 25, 2002, an auditor from the Division telephoned Haseley Trucking's controller to advise him that an audit of the company's books and records would be undertaken. Haseley Trucking had been audited by the Division during earlier periods, including the period spanning June 1, 1996 through February 28, 1999. It appears from the record that the audit

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<sup>2</sup> The amount shown with respect to Notice Number L-022519918 reflects tax only, and does not reflect penalty and interest amounts assessed. Further, the dollar amount of tax for such notice was reduced to \$12,845.47 by Conciliation Order dated June 27, 2003, reflecting the elimination of the first four sales tax quarterly periods covered by such notice on the basis that the notice had been issued after the expiration of the period of limitations on assessment for such quarterly periods.

<sup>3</sup> The amounts shown with respect to Notice Nos. L-021394998 through L-021395002, pertaining to petitioner Mark M. Haseley as a responsible person for Haseley Construction Company, Inc., and Notice Nos. L-021406262 through L-021406266, pertaining to Mark M. Haseley as a responsible person for Haseley Trucking, represent penalty equal to the amount of unpaid withholding tax owed by the respective corporate entities. The amounts shown with respect to Notice Nos. L-021684276 and L-021684277, pertaining to petitioner Mark M. Haseley as a responsible person for M & M Rental & Leasing Corporation, reflect tax only, and do not reflect penalty and interest amounts assessed.

giving rise to the notices at issue herein was a follow-up on a “recommendation to re-audit” as set forth in the earlier audit report. Haseley Trucking’s controller advised the auditor that the company was going out of business and requested that the auditor call back in a couple of weeks.

5. On February 6, 2002, the auditor again called Haseley Trucking’s controller to inquire about conducting an audit. In response, the auditor was advised to call back at a future time, due to ongoing confusion about the future of the company. The auditor agreed to call back in a week in order to ascertain a time and place to obtain and review the company’s books and records. On the same February 6, 2002 date, the auditor sent a letter to the company confirming this understanding and including a “Responsible Person Questionnaire.” Subsequent calls were made by the auditor on February 20, 2002 and on March 6, 2002, again seeking availability of the company’s books and records and a time to conduct an audit. These calls were answered in the same fashion. By a letter dated March 7, 2002, the auditor again requested availability of the company’s books and records and a date to conduct the audit. This letter included a request that the same be given to the company’s owner or attorney in order that they would be aware of the audit requirements. This letter was accompanied by a detailed list specifying those records required for audit purposes.

6. On April 2, 2002, the auditor attempted to telephone Haseley Trucking, but the company’s telephone had been disconnected. In turn, the auditor issued a letter dated April 15, 2002 again requesting that the company’s books and records be made available and scheduling an April 29, 2002 audit meeting at the company’s place of business. In response, Mr. Haseley contacted the Division to advise that he was not then prepared for an audit to start on April 29, 2002 and that the company was no longer in business. Mr. Haseley was advised that the auditor would contact him on April 29, 2002 to discuss the records needed for the audit.

7. The auditor was unsuccessful in contacting Mr. Haseley on April 29, 2002 and issued a letter on such date again requesting the availability of books and records, enclosing a detailed list of those records required for audit and rescheduling the audit for May 13, 2002 at the company's offices. On May 13, 2002, the auditor went to Haseley Trucking's place of business, but was advised by the company's controller that the records were not ready to be reviewed. Thereafter, by a letter dated May 31, 2002, the auditor advised Mr. Haseley that the audit would commence on June 24, 2002 and requested that the company's books and records be made available for audit on such date.

8. On June 24, 2002, the auditor went to the company's place of business, finding the office unlocked but no one present. The auditor waited an hour, during which time he observed gas pump usage logs with entries therein for the months of May and June 2002. The auditor left the premises and, given the ongoing inability to obtain books and records to conduct an audit, decided to estimate the company's sales tax liability for the period March 1, 1999 through February 28, 2002 based on the results of the previous sales tax field audit of the company which covered the period June 1, 1996 through February 28, 1999, as described hereafter:

a) *Taxable Sales*: Sales tax due on taxable sales for the period June 1, 1996 through February 28, 1999 had been computed based on a test period analysis of sales invoices for the year 1997, as agreed to by Haseley Trucking. Sales tax due for this period, totaling \$1,619.00, was extrapolated based on a comparison of like quarters to the audit period in question. Since the earlier period covered some 11 sales tax quarterly periods while the period in question here covered 12 sales tax quarterly periods, the auditor determined sales tax due on sales for the final quarterly period by averaging such tax due for the 11 quarterly periods covered by the earlier audit. By this method, the auditor determined additional sales tax due on taxable sales in the amount of \$1,767.10.

b) *Assets and Expenses*: Tax due on purchases of fixed assets for the earlier audit period had been determined by a detailed examination of purchase invoices for the entire audit period. Tax due on expenses had been computed for the earlier audit period based on a test period analysis of

expense purchases invoices for the year 1997. The auditor extrapolated the results of these two audit methods to the period in issue here in the same fashion as above, and calculated tax due in the amount of \$560.00 on fixed assets and tax due in the amount of \$17,691.91 on expenses.

As the result of the foregoing audit calculations, the auditor determined additional tax due for the period March 1, 1999 through February 28, 2002 in the aggregate amount of \$20, 019.01, and assessed the same, plus penalties and interest, against petitioners.

9. Petitioner Mark M. Haseley has not disputed his responsibility to collect and remit either withholding taxes or sales and use taxes on behalf of Haseley Trucking, Haseley Construction Company, Inc., or M & M Rental & Leasing Corporation, nor has he disputed the amounts of withholding taxes or sales and use taxes for which he is allegedly responsible (except with regard to the propriety of the audit results pertaining to Haseley Trucking assessed against him pursuant to Notice No. L-022159918 [as reduced]). Rather, Mr. Haseley maintains that the Division should have collected the amounts of such taxes due from either the New York State Department of Transportation or from the corporate petitioner's bonding company.

10. During the years 2000 through 2002, the Haseley Companies were involved in a large landfill construction project in New Jersey. Unfortunately, there were a number of unforeseen changes, difficulties and delays in this project, including delays in payments to the Haseley Companies. These problems, including most specifically the payment delays and resulting cash flow difficulties, liens and judgments, were severe such that by early 2002, the Haseley Companies were nearing total collapse. Ultimately, the problems led to the closure of the Haseley Companies, with eventual intervention by Haseley Trucking's bonding company to complete the construction work.

### ***SUMMARY OF PETITIONERS' POSITION***

11. Petitioners maintain that the company's telephones were disconnected as of approximately April 2002 in connection with their closure, but that petitioner Mark M. Haseley was still at the company offices dealing with the close down of the companies. Petitioners assert that when the auditor visited the premises on June 24, 2002, the gasoline pump usage logs he observed for the months of May and June reflected use of the premises by another company (with permission) and did not indicate ongoing activities by the Haseley Companies. Petitioners also maintain that the records necessary to conduct an audit were present at the Haseley Companies' offices. Finally, petitioners assert that business activity dropped dramatically due to the payment and cash flow problems, and that audit results from prior years are not indicative of the amount of business activity engaged in by Haseley Trucking for the years at issue herein.

12. Petitioners also assert that the New York State Department of Transportation held certain monies relating to the Haseley Companies in the form of retentions, the amounts of which were allegedly sufficient to cover the liabilities at issue herein. Petitioners maintain that some of such retention money was released to pay certain liabilities outstanding to the Internal Revenue Service, with more allegedly later released to the bonding company. Petitioners requested that the same action be undertaken to pay off the liabilities herein, but allege that despite such request, no such action occurred.

### ***CONCLUSIONS OF LAW***

A. Where a taxpayer's records are not available, or are insufficient, unreliable and inadequate to verify, upon audit, the amount of the sales and use taxes due for the period under examination, the Division is authorized to estimate such tax liability on the basis of external indices (Tax Law § 1138[a][1]; *see, Matter of Ristorante Puglia, Ltd. v. Chu*, 102 AD2d 348,



478 NYS2d 91, 93; *Matter of Surface Line Operators Fraternal Org. v. Tully*, 85 AD2d 858, 446 NYS2d 451, 452). In this case, the Division made numerous (at least six) telephone requests seeking to obtain access to Haseley Trucking's records so as to conduct an audit, and also sent several (at least four) follow-up letters making the same requests, including therewith a detailed listing of the records to be provided. In response to these oral and follow-up written requests, the auditor was initially faced with delay requests and, when he visited the company's premises on May 13, 2002, was advised that no records were ready to be reviewed. Thereafter, when the auditor visited the premises as scheduled on June 24, 2002, no personnel from the company were present. Given these ongoing and repetitive efforts to access and review Haseley Trucking's records, and the failure of petitioners to make such records available, it was clearly appropriate for the Division to resort to an indirect audit methodology (*Matter of Continental Arms Corp. v. State Tax Commission*, 72 NY2d 976, 54 NYS2d 362). Without diminishing the difficulties undoubtedly faced by the Haseley Companies and petitioner Mark M. Haseley during the relevant time period, it remains that the Division made reasonable and repeated efforts to obtain and review records and was unable to do so.

B. Where, as here, the Division seeks to determine a taxpayer's sales tax liability on the basis of an indirect audit method, the methodology selected must be reasonably calculated to reflect the taxes due (*Matter of Ristorante Puglia, Ltd. v. Chu, supra*; *Matter of W.T. Grant Co. v. Joseph*, 2 NY2d 196, 159 NYS2d 150, 157, *cert denied* 355 US 869). However, exactness in the outcome of the audit method is not required (*Matter of Markowitz v. State Tax Commn.*, 54 AD2d 1023, 388 NYS2d 176, 177, *affd* 44 NY2d 684, 405 NYS2d 454; *Matter of Lefkowitz*, Tax Appeals Tribunal, May 3, 1990). The burden rests with the taxpayer to show by clear and convincing evidence that the methodology was unreasonable or that the amount

assessed was erroneous (*Matter of Meskouris Bros. v. Chu*, 139 AD2d 813, 526 NYS2d 679; *Matter of Surface Line Operators Fraternal Org. v. Tully, supra*).

C. In this case petitioners have shown no error in either the audit method utilized or the results derived from its application. Petitioners have not shown that the methodology was in any manner incorrect or unreasonable. Petitioners have not come forward with any documents, including source records of sales or purchases, or other evidence to refute the estimates and result based upon the Division's own prior period audit as relied upon by the auditor in arriving at the assessments in issue. Simply put, the Division's estimate of sales and use taxes due on the basis of the results of its own sales and use tax audit for the 11 sales tax quarterly periods immediately preceding those at issue herein was reasonable. In fact, it appears that the major difficulty faced by the Haseley Companies was in being paid for its work, resulting in a severe cash flow problem and ultimately in closure of the Haseley Companies. While it is sometimes the case, it does not necessarily follow that cash flow difficulties always result from lower sales or equate to lower sales or use tax liability. While the post-hearing briefs and the affidavits, filed by petitioners and by Mark M. Haseley, respectively, make the claim that records were available, there is no other evidence to establish that such records were available at the time of audit, nor have any such records been offered in evidence. The Division is clearly entitled to rely on its own prior audit experience in its estimation process, particularly in light of a taxpayer's failure to supply any reliable records or information concerning its operations (*Matter of Convissar v. State Tax Commn.*, 69 AD2d 929, 415 NYS2d 305; *Matter of Giordano v. State Tax Commn.*, 145 AD2d 726, 535 NYS2d 255). In sum, the audit method employed had a rational basis, the result derived therefrom is presumed to be correct in the absence of any evidence bearing out error in such result and such result is, therefore, sustained (*Matter of Hammerman*, Tax

Appeals Tribunal, August 17, 1995; *Matter of Fashana*, Tax Appeals Tribunal, September 21, 1989). Thus, the notices of determination issued to petitioner Haseley Trucking (L-021320430) and to petitioner Mark M. Haseley (L-02215998 [as reduced]), premised on the results of the audit, are sustained.

D. The balance of the notices at issue in this proceeding were issued against petitioner Mark M. Haseley as a person responsible to collect and remit sales and use taxes and withholding taxes on behalf of petitioner Haseley Trucking and two other Haseley companies, to wit, Haseley Construction Company and M & M Rental & Leasing Corporation. Mr. Haseley has not disputed his status as such a person responsible to collect and remit sales and use taxes (Tax Law § 1131[1]; § 1133[a]) or withholding taxes (Tax Law § 685[g],[n]), nor has he disputed the dollar amounts assessed against him for his failure to have done so. Rather, his only complaint is that the Division has not proceeded against either the New York State Department of Transportation seeking release of the monies allegedly held in retention, or against the bonding company for its alleged responsibility to pay withholding taxes due.

E. Matters involving collection are generally beyond the jurisdictional grant of authority of the Division of Tax Appeals. Petitioners here timely filed petitions challenging the subject deficiencies. At this stage of proceedings, and pending conclusion of petitioners' challenge herein and any subsequent appeals, the amounts in question do not yet represent fixed and final assessments subject to collection. Moreover, and as the Division points out, it is unclear from the record herein whether there are any funds held by the Department of Transportation or the Comptroller of the State of New York which may, in light of other creditors and creditor priority standing, be subject to collection against the subject assessments. In addition, the Division is under no obligation to pursue other allegedly responsible persons before proceeding against

petitioner ( *see, Matter of Risoli v. Commissioner of Taxation and Finance*, 237 AD2d 675, 654 NYS2d 218). Further, petitioners' assertion that sufficient funds exist to pay off the assessments at issue is irrelevant to the question of Mark Haseley's status as a person responsible for the payment of such assessments.<sup>4</sup>

E. The petitions of Haseley Trucking Company, Inc. and of Mark M. Haseley are hereby denied and the notices of determination and notices of deficiency, as set forth in Findings of Fact "2" and "3", as reduced only with respect to Notice No. L-022159918 (*see* Footnote 2) are sustained.

DATED: Troy, New York  
April 28, 2005

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/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE

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<sup>4</sup> Any payments or recoveries applicable to the same periods for which petitioner Mark M. Haseley is assessed, which serve to reduce the amount of tax, penalty or interest due for such periods, would inure to Mr. Haseley's benefit and likewise reduce the assessment against him (Tax Law § 1138[1][3][B]; *see, Matter of Halperin v. Chu*, 138 AD2d 915, 526 NYS2d 660, *appeal dismissed in part, denied in part*, 72 NY2d 938, 532 NYS2d 845).